

## REMARKS

The Office Action dated February 9, 2004 has been fully considered by the Applicant.

By way of the present amendment, Claims 1 and 7 have been amended.

The comments of the Examiner under 35 U.S.C. §112, second paragraph, regarding Claim 1 have been addressed by revising “soluble humatic compounds” to “soluble humates and active humic compounds” which is commonly used and is not believed to alter the meaning of the terms. Additionally, “whole-grain barley grain” has been revised as “whole barley grain”.

The rejection of Claims 1 and 4 through 6 under 35 U.S.C. §102(b) as anticipated by Richards et al. has been addressed by amendment of Claim 1.

Richards et al. (U.S. Patent No. 1,471,979) is directed to making soluble nitrogenous compounds into insoluble or less soluble nitrogenous forms in order to build a time-release fertilizer. The disclosure focusing on assuring that “the soluble nitrogen is transformed into insoluble derivatives” (Page 1, line 48). In contrast, the present invention utilizes a processed straw or other organic matrix to produce and immobilize organisms for the purpose of extracting nutrients from aquatic areas, not adding them. The present invention helps to control or limit the growth of algae contaminants. While Richards et al. does teach the use of inoculation with certain additional organisms, it does not speak to the specific organism or organisms to be used. Richards et al. does not appear to disclose or suggest aerobic bacteria nor specifically *Bacillus subtilis* or other aerobic bacteria.

The rejection of Claims 1 through 6 and 8 through 10, as now amended, under 35 U.S.C. §102(b) as anticipated by Ely et al. (U.S. Patent No. 3,151,983) is respectfully traversed.

Moreover, Ely et al. does not appear to disclose or suggest “humic or humatic products” as the result of the fermentation *Bacillus subtilis* or the fungus *Aspergillus oryzae* being fermented. Ely et al.

restricts itself to the use of wheat bran (and perhaps rice hulls) as a substrate. Furthermore, the end product contains enzymes and growth factors or “growth response” for poultry. The humic factors attributable to the degraded straw work optimally in an aquatic environment.

The rejection of Claims 1 through 10 under 35 U.S.C. §103(a) as obvious over Ely et al. taken with Richards and Jeffreys is respectfully traversed. As set forth above, none of the references either singly or taken together disclose the limitations of Claim 1 as now amended. Jeffreys describes a process for producing concurrently a culture comprised of an aerobic bacteria along with such aerobic bacteria or fungi necessary so as to occlude or eliminate oxidative conditions of the mixed bacterial culture.

In summary, the combination of the references taken together do not disclose all of the features of the present invention.

Moreover, it is improper to combine references to achieve the invention under consideration unless there is some incentive or suggestion in the references to do so.

The Court of Appeals for the Federal Circuit has repeatedly held that under Section 103, teachings from various references can be combined only if there is some suggestion or incentive to do so. ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F2d 1572, 221 USPQ 929 (CAFC 1984).

Stated another way:

It is impermissible, however, simply to engage in a hindsight reconstruction of the claimed invention, using the applicant's structure as a template and selecting elements from references to fill the gaps...The references themselves must provide some teaching whereby the applicant's combination would have been obvious. In re Gorman, 18 USPQ2d 1885 (CAFC 1991).

The Examiner is required to follow the law as set forth by the Federal Circuit. In summary, the combination of patents to achieve the claims of the present invention is untenable.

Finally, dependent Claim 7 has been amended to depend on Claim 3. As acknowledged by the Examiner in the present Office Action, Richards et al. does not anticipate either Claim 3 or Claim 7 and Ely et al. does not anticipate Claim 7. Accordingly, Claim 7 as now amended is believed allowable.

The remaining claims are all dependent on Claim 1 and believed allowable for the same reasons.

It is believed that the foregoing is fully responsive to the outstanding Office Action. If any further issues remain, a telephone conference with the Examiner is respectfully traversed.

Respectfully submitted,



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